83 - 1886

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DAVID M. NEWMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

When a district court has deferred decision on whether to accept or reject a plea agreement, may a defendant withdraw his consent thereto and thereby void a previously entered guilty plea.

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OPINIONS BELOW

The court of appeals summarily affirmed the judgment below App. A, p. A1. The pertinent part of the oral opinion of the district court appears in App. B, p. A3.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on April 19, 1984. The time within which to file a petition for a writ of certiorari extends to and includes June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 11, Fed. R. Crim. P., provides in pertinent part:

(e) Plea Agreement Procedure

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

STATEMENT OF THE CASE

Petitioner was indicted and charged with possession with intent to distribute cocaine, 21 U.S.C. 841(a), marijuana possession, and possession of unregistered pistols. On July 18, 1983, he entered a written plea agreement and pleaded guilty to possession with intent to distribute cocaine. In return therefore, the government agreed to dismiss the remaining counts in this indictment, and the entire indictment in another case, wherein petitioner and Rene Contee were charged with conspiracy to possess piperidine knowing it would be used in the illegal manufacture of phencyclidine (PCP), 21 U.S.C. 841 (d)(2), and related offenses.

At the time the guilty plea was taken, the signed plea agreement – as orally supplemented – was outlined to the district judge who received a copy thereof. (Tr. I, 2-3, 7-8).[1]

In the course of taking the plea, the following colloquy between the court and petitioner occurred:

> "The Court: Now, has anyone made any promise to you other than the plea agreement, and the amendment thereto proffered by [the prosecutor] to induce you to plead guilty?
>
> Defendant Newman: No, Your Honor.
>
> The Court: Do you understand that I am not required to accept this plea agreement and that I could reject it?
>
> Defendant Newman: Yes, Your Honor.
>
> The Court: Do you understand that if I were to reject it, you could, nevertheless, continue your plea of guilty and your sentence so the disposition of your case could be less favorable to you?
>
> Defendant Newman: Yes, Your Honor.
>
> The Court: Do you understand that I intend to refer your case to a probation officer for consideration and recommendation?
>
> Defendant Newman: Yes, I do.
>
> The Court: And do you understand that you will be interviewed by that probation officer?
>
> Defendant Newman: Yes, I do, Your Honor.
>
> The Court: Are you willing to submit to that interview by the probation officer?
>
> Defendant Newman: Yes, I am." (Tr. I 8)
>
> (Emphasis supplied)

[1] "Tr. I" refers to the plea transcript of July 18, 1983.

Prior to sentencing, petitioner moved to withdraw his guilty plea alleging, *inter alia*, that it was a conditional plea subject to avoidance because the district court had not yet accepted the tendered plea agreement.[2]

In rejecting this prong of the withdrawal motion, the district court agreed with petitioner's evaluation of the Rule 11(e) record, but sought to avoid the thrust of the conditional plea claim by belatedly accepting the plea agreement.

> "The Court: * * * * *
>
> Insofar as the Rule 11 'conditional plea' [redacted] argument is concerned, I conclude that the withdrawal of a plea is permitted of right only if the court rejects the agreement and that I am permitted to accept or reject that agreement both before or after it (the guilty plea) is accepted. And I hereby state on the record that I accept the agreement as made, that it was freely and voluntarily made on the basis of the evidence before me and

---

[2]The withdrawal motion filed by new (present) counsel was not pursued without purpose, for it also alleged: (1) that petitioner never admitted to facts constituting the crime to which he pleaded guilty and, (2) that there was a legally cognizable defense to the charge grounded in a violation of 18 U.S.C. §3109. (1) At the Rule 11 hearing, although the government alleged that the cocaine was possessed for commercial sale, petitioner demurred, stating that "I was going to take it to [a] party that night, and I was going to share it with some friends of mine." (Tr. I 9) (2) A police report and preliminary hearing transcript clearly demonstrated, we alleged, that police officers did not announce their authority or purpose prior to breaking into petitioner's home and seizing one-half ounce of cocaine. Although this presented two additional valid reasons for permitting the plea to be withdrawn, their rejection is not of sufficient moment to warrant review by the Court and, accordingly, are not included in the petition.

I decline to allow the plea to be withdrawn on that ground." (Tr. II 44)[3]

The court of appeals affirmed this ruling without opinion, App. A, p. A1.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity to resolve a conflict in the circuits concerning the right of either party to abrogate an executed plea agreement prior to acceptance by the district court. Its resolution will also clear up an ambiguity in Rule 11, which impacts upon the day to day operation of the criminal justice system.[4]

As correctly observed by the district judge herein, Rule 11 *permits* the court to accept or reject a plea agreement after a guilty plea is entered. (Tr. II 43-44) However, if the agreement is of the type specified in subdivison (e)(1)(A) – the instant case – or (C), and the court rejects the agreement after entry of the guilty plea, it must "afford the defendant the opportunity to then withdraw his plea . . ." (e)(4) If it is accepted, that event seals the bargain. Prior to the agreement's acceptance or rejection by the court, its status during the interim period is not so clear. Both the district court and the court of appeals held petitioner to the agreement until it was accepted. The fifth cir-

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[3]"Tr. II" refers to the hearing transcript of October 7, 1983.

[4]A worthwhile goal, we submit, since for the calendar year ending June 30, 1983, of 35,591 criminal convictions in the United States district courts, 30,523 were by pleas of guilty or nolo contendere. Report of Director of Administrative Office of United States Courts for Period July 1, 1982-June 30, 1983. App. Table D-4. Furthermore, in our experience, practically every guilty plea involves a plea agreement of some sort.

cuit rejects this approach and permits either party to withdraw therefrom prior to approval by the court.

> "Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time." *United States v. Ocanas,* 628 F.2d 353, 358 (5th Cir. 1980)

It is irrelevant that in *Ocanas*, the district court never *accepted* the tendered guilty plea before considering the plea bargain. The critical factors which make this case indistinguishable from *Ocanas,* are the presence of fully executed plea agreements unapproved by the court when the attempted withdrawal occurred. These circumstances, we submit, yield precisely the same "conditional" guilty plea herein as existed in *Ocanas.* The reasons are clear. Since petitioner's agreed to guilty plea was induced by the plea agreement, he never intended to enter a plea severed from the agreement. Thus, although the district court achieved that result by accepting the plea and not the plea agreement, the effect of that inconsistent action was to render the plea conditional. Accordingly, in both *Ocanas* and this case it would have been impermissible for the district court to have imposed sentences prior to accepting the plea agreement. *A fortiori* the court accepted a "guilty plea" in name only which did not bind petitioner to its usual consequences. It was, therefore, clear error for the court of appeals to hold petitioner to a guilty plea he could "walk away from" any time before acceptance of the plea agreement by the trial court.

In *United States v. Sanchez,* 609 F.2d 761 (5th Cir. 1980), the district court mirrored what was done here, characterizing its action as acceptance of the guilty plea "temporarily" while considering the plea agreement. On

appeal, the lower court's rejection of the plea agreement and voiding of the plea were sustained. In so ruling, the court of appeals observed that Rule 11 "does not in express terms cover this situation, but we find that the judge did not violate its purpose." 609 F.2d at 762-763. In *United States v. Cruz,* 709 F.2d 111 (1st Cir. 1983), however, a bargained guilty plea could not be vacated because, in accepting the plea, the court did not reserve its right to accept or reject the plea agreement "as it might have under Federal Rule of Criminal Procedure 11(e)." 709 F.2d at 112. *Cruz* and *United States v. Burruezo,* 704 F.2d 33 (2d Cir. 1983), are reflective, no doubt, of what district judges do all the time at Rule 11 proceedings, *i.e.,* accept the guilty plea and remain silent about the agreement – not realizing that this silence severely limits later sentencing discretion.

The bottom line is that the court below bound petitioner to a conditional guilty plea he had the right to avoid; a ruling in clear conflict with both precedent from another circuit and logic.

The numerous appellate rulings dealing with (e)(1)(A) and (C) plea bargains gone awry, leads us to, perhaps, the most important reason for granting the petition. Resolution of this case will enable the Court to spell out the correct procedure for district courts to follow pursuant to Rule 11(e), and thus preclude similar cases from arising. Briefly summarized for now, it is our view that under Rule 11 the following should occur in (e)(1)(A) or (C) situations:

1. Upon presentation of a plea agreement to a judge, the latter should either accept or reject the agreement *on the record* if one of those alternatives is immediately decided upon. If accepted, – normally the case – the plea is taken and the defendant notified pursuant to (e)(3). If

rejected, the court advises the defendant pursuant to (e)(4).[5]

2. Upon reading the plea agreement, should the judge decide to defer his decision until after reviewing the presentence report ((e)(2)), *no plea of any sort should be taken or entertained.* Instead, the judge should obtain the defendant's written consent to inspect the presentence report (Rule 32(c)(1)), and order one prepared. After examining it, the court will either accept or reject the plea agreement and proceed accordingly.

We believe this to be the procedure originally contemplated by Rule 11(e), instead of the cumbersome, error-prone one that has sprung up involving the taking of "conditional" pleas when the decision to accept or reject the plea agreement is deferred.

We consider this to be the correct view of 11(e) for several reasons. In the first place, until the 1983 amendment allowing for conditional pleas of guilty or nolo contendere for purposes not related to 11(e), Rule 11 did not and does not permit the taking of conditional pleas. Secondly, the Notes of the Advisory Committee, under Rule 32, supports our view:

> "Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea . . . . It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the

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[5]Since there has been no antecedent plea, the language of (e)(4) obviously refers to a defendant's withdrawal of "his [proposed] plea."

necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement."

And lastly, the procedure we have proferred makes common sense and will preclude many misunderstandings from arising.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict in the circuits and to spell out the correct procedure for the district courts to follow in effectuating Rule 11(e).[6]

Respectfully submitted,

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Counsel for Petitioner
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[6]The instant case would also appear to be a likely follow-up to *Mabry v. Johnson*, No. 83-328.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 83-2091 September Term, 1983

UNITED STATES OF AMERICA Criminal No. 83-000054-01

v.

DAVID M. NEWMAN, Appellant

Appeal from the United States District Court
for the District of Columbia

Before WRIGHT, TAMM, and WILKEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been fully considered by the court; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is affirmed.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely peti-

tion for rehearing. *See* D.C. Cir. R. 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED APR 19 1984

GEORGE A. FISHER
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

TRANSCRIPT EXCERPT

The Court: Before the court is the defendant's motion to withdraw his plea of guilty to one count of a three-count indictment, which charges possession of cocaine with intent to distribute. And that plea was entered on July 18th, 1983, shortly before trial was to commence in a companion case in which a co-defendant was also charged with this defendant. It was entered pursuant to a plea agreement by which the government agreed to dismiss the companion case and the remaining two counts of this case in return for the plea.

The instant motion was filed after the other co-defendant in the companion case was sentenced to a term of imprisonment and after the presentence report became available to predecessor counsel.

All of those facts are apparent from the record in this case.

Insofar as the Rule 11 "conditional plea" argument is concerned, I conclude that the withdrawal of a plea is permitted of right only if the court rejects the agreement and that I am permitted to accept or reject that agreement both before or after it is accepted. And I hereby state on the record that I accept the agreement as made, that it was freely and voluntarily made on the basis of the evidence before me, and I decline to allow the plea to be withdrawn on that ground.

No. 83-1886

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID M. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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DAVID M. NEWMAN, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that he had the right to withdraw a guilty plea after it was entered, but before the court had formally accepted the plea agreement and determined the sentence.

1. In two separate indictments in the United States District Court for the District of Columbia, petitioner was charged with various drug-related offenses. In the first indictment, filed on February 18, 1983, he was charged (along with co-defendant Rene Contee) with conspiracy to possess piperidine, knowing that it would be used to manufacture phencyclidine (PCP), in violation of 21 U.S.C. 841(d)(2) and 846, and related offenses. In the second indictment, filed on March 18, 1983, petitioner was charged with possession of cocaine with intent to distribute it, possession of marijuana, and possession of an unregistered

firearm, in violation of 21 U.S.C. 841(a) and 844, and D.C. Code Ann. § 6-2311(a) (1981).

On July 18, 1983, pursuant to a written plea agreement, petitioner entered a plea of guilty to possession of cocaine with intent to distribute, in return for which the government agreed to dismiss the remaining charges against him. The agreement contained no agreed-upon sentence or sentence recommendation. See Fed. R. Crim. P. 11(e)(1)(A). The district court questioned petitioner in accordance with Rule 11 of the Federal Rules of Criminal Procedure, and then stated, "I will accept your plea of guilty and enter a judgment of guilty on the plea" (7/18/83 Tr. 11). The court then referred the case to a probation officer for consideration and recommendation of a sentence.

After entry of his plea, but before sentencing, petitioner obtained new counsel. On October 4, 1983, shortly before sentencing, petitioner moved to withdraw his guilty plea. He argued, inter alia, that the plea had been "conditional" because the plea agreement had not yet been accepted by the district court. The court denied petitioner's motion, and petitioner was sentenced to five years' imprisonment and three years' special parole, and was fined $25,000.

The court of appeals affirmed without opinion (Pet. App. A1-A2).

2. Petitioner contends (Pet. 6-7) that, when the district court does not accept or reject the plea agreement at the time a guilty plea is entered, the defendant retains the right to withdraw the plea at any time prior to the court's decision. He states that the court's action in "accepting the plea and not the plea agreement * * * render[s] the plea conditional" (*id.* at 7).[1] This claim is without merit.

---

[1]We do not fully understand what petitioner means when he states that the plea was "conditional" (see Pet. 7). We agree that the plea was

As an initial matter, the legal argument raised by petitioner is not plainly presented on the facts of this case. His claim depends upon a distinction between acceptance of the *plea* and acceptance of the *plea agreement*. However, at the time the district court accepted petitioner's guilty plea, it stated, "I will accept your plea of guilty *and enter a judgment of guilty on the plea*" (7/18/83 Tr. 11 (emphasis added)). For a court to state that it will enter a judgment of guilty on a plea is, we submit, tantamount to accepting the agreement as well as the plea. The transcript also reveals (*id.* at 11-12) that the delay between entry of the plea on July 18, 1983, and entry of the judgment was attributable to the court's decision on *sentence* — a matter not covered by the plea. Indeed, a delay of three weeks was expressly requested by defense counsel for the purpose of referring the case to the Alexandria Institute for Alternative Sentences for review. Once a defendant has tendered a plea of guilty, and the plea agreement has been accepted by the district court, the defendant may not take advantage of a deferred decision on sentence in order to withdraw his plea.

Even assuming that the district court deferred decision on whether to accept or reject the plea agreement, petitioner had no right to withdraw his plea. The district court was clearly correct in holding that "the withdrawal of a plea is permitted of right only if the court rejects the [plea] agreement" (Pet. App. A3).

Rule 11(e)(2) of the Federal Rules of Criminal Procedure expressly envisions that the district court "may defer its decision as to the acceptance or rejection until after there has been an opportunity to consider the presentence

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subject to a condition subsequent — acceptance of the agreement by the district court. But we do not agree that the plea was purely tentative, *i.e.*, that petitioner was free to withdraw from the agreement for any reason at any time prior to its formal acceptance by the court.

report." The Rule goes on to provide that, if the court *rejects* the plea agreement, it must "afford the defendant the opportunity to then withdraw his plea" (Fed. R. Crim. P. 11(e)(4)). The Rule does not provide a right to withdraw a tendered plea for any other reason. Unless the court rejects the agreement, therefore, withdrawal would seem to be governed by Fed. R. Crim. P. 32(d), which permits a defendant to move for withdrawal of a guilty plea, in the discretion of the district court, upon a showing of "any fair and just reason."

Petitioner made a Rule 32(d) motion, which was denied by the district court. Petitioner does not now challenge that decision (Pet. 5 n.2). Petitioner therefore has no basis for his claim under the Federal Rules of Criminal Procedure. And since he neither cites nor relies upon the Constitution or any statute, we are unable to perceive a legal basis for his claim.

Our analysis is consistent with this Court's recent decision in *Mabry* v. *Johnson,* No. 83-328 (June 11, 1984). The Court there rejected the court of appeals' holding that, as a matter of due process, a plea bargain becomes binding on the government upon acceptance by the defendant. Instead, the Court held, "[i]t is the ensuing guilty plea that implicates the Constitution" (slip op. 3). If the bargain becomes binding on the parties at the time of entry of the guilty plea, as *Mabry* suggests, then after that point neither the defendant nor the government has, as a matter of right, the privilege to withdraw.

3. The decision below does not conflict with *United States* v. *Ocanas,* 628 F.2d 353 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981).[2] In *Ocanas,* a plea agreement provided

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[2] *United States* v. *Cruz,* 709 F.2d 111 (1st Cir. 1983), and *United States* v. *Sanchez,* 609 F.2d 761 (5th Cir. 1980), cited by petitioner (Pet. 7-8), are in full accord with the decision below. In each case, the district court was held to be without power to reject a plea agreement having

for dismissal of certain charges against the defendants. The defendants tendered their pleas, but the district court deferred decision on whether to accept the agreement. Before the district court formally rejected the plea agreement, the government obtained a superseding indictment inconsistent with the agreement (*id.* at 356).[3] The district court then dismissed the original indictment and scheduled trial on the superseding indictment (*ibid.*). In effect, the government was *permitted* to withdraw from the plea agreement. The conviction in *Ocanas* is thus perfectly consistent with the principle embodied in the Federal Rules of Criminal Procedure and applied in *Mabry*: prior to entry of a plea, both parties are free to withdraw at any time, but after a plea is entered, neither party may withdraw except at the discretion of the district court, or if the plea agreement is rejected by the court.[4]

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once unequivocally accepted it. Accord, *United States* v. *Blackwell*, 694 F.2d 1325, 1336-1337 (D.C. Cir. 1982). These decisions have no bearing on a defendant's right to withdraw a tendered plea before it is either accepted or rejected.

[3]Although the court of appeals did not mention the fact in its opinion, the government did not seek the superseding indictment until after the district court had advised the prosecutors informally that it would reject the proposed plea agreement. Memorandum for the United States in Opposition, *Ocanas* v. *United States*, *supra*, at 2, 4.

[4]In affirming the convictions in *Ocanas*, the court of appeals announced the "general rule" that "either party should be entitled to * * * withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court" (628 F.2d at 358). We do not agree with this general rule, and in our opposition to the petition for certiorari in *Ocanas* did not defend it. Given the factual context of *Ocanas* — in which the district court sanctioned the government's withdrawal from the plea agreement — there is no conflict that requires resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1984

DOJ-1984-07

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To The United States Court of Appeals
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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

The government's lead-off argument In Opposition posits that the facts of the case do "not plainly [present]" petitioner's legal claim. Opp. 3. This argument is, however, clearly erroneous because the record unambiguously establishes that the district court accepted petitioner's guilty plea *and* deferred decision on whether to accept or reject the plea agreement.[1]

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[1] A course contemplated by Rule 11(e)(4).

In limine, petitioner fully endorses the government's contention that when a district court enters a judgment of guilty on the plea, this is "tantamount to accepting the agreement as well as the plea;" Opp. 3, a well established rule in the D.C. Circuit. *United States v. Blackwell,* 694 F.2d 1325 (D.C. Cir. 1982). Application of this rule, however, presupposes the absence of a contrary intent by the court; the very countervailing factor indelibly presented by the record and carefully omitted from the Opposition.

1. At the time the plea was accepted, the district judge admonished petitioner that he was free to either "accept this plea agreement [or] . . . I could reject it." Tr. I 8. A rather clear indication of the court's intent to defer decision thereon. An intent corroborated by the judge's further inquiry whether or not petitioner was "willing to submit to [an] interview by the probation officer?" Tr. I 8. A permission not normally requested when a plea is entered unless acceptance of the agreement is deferred pursuant to Rule 32(c)(1). Furthermore, this is the very context wherein judges traditionally delve deeper before accepting the agreement, *i.e.,* when a plea is permitted to a minor cocaine felony possession in exchange for the mandatory dismissal of a far more serious P.C.P. conspiracy indictment grounded in a wiretap — a tap the court was initially asked to approve.

2. At the hearing on the motion to withdraw the plea, the district judge who was well acquainted with the *Blackwell* rule[2] could have ended the matter then and there by simply declaring that when the plea was accepted, the

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[2]The court observed during the hearing:

> "[S]ince a plea agreement is an integral part of most guilty pleas, the acceptance of the plea represents, by implication at least, the acceptance of that agreement." Tr. II 25-26.

court thereby also intended to accept the plea agreement. Since that was obviously not his intention at the time, having deferred decision thereon, the court rejected application of this theory to the facts and denied withdrawal of the plea on the following far different ground:

> "Insofar as the Rule 11 'conditional plea' argument is concerned, I conclude that the withdrawal of a plea is permitted of right only if the court rejects the agreement and that I am permitted to accept or reject that agreement both before or after it (the guilty plea) is accepted. And I hereby state on the record that I accept the agreement as made, that it was freely and voluntarily made on the basis of the evidence before me and I decline to allow the plea to be withdrawn on that ground." Tr. II 43-44.

II.

Facing the issue squarely, the government contends that when a guilty plea is entered and the court defers decision on whether to accept or reject the plea agreement, a defendant is bound by that executory agreement until and unless the court rejects it. The instant ruling, which rests upon this theory, collides head-on with *United States v. Ocanas,* 628 F.2d 353 (5th Cir. 1980). In upholding the government's right to repudiate the plea agreement in *Ocanas* the court observed:

> "Thus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore

> reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court." 628 F.2d 358.

In attempting to sidestep the conflict, the government first announces that it "[does] not agree with this general rule . . ." (Opp 5 n.4). Hardly persuasive reasoning. It follows this up by characterizing *Ocanas* as a case wherein the government was "*permitted* to withdraw from the plea agreement." (Opp. 5) (Emphasis in original). To support this misreading of the *opinion,* facts are adduced which are not reported in F.2d. While the court of appeals could conceivably have narrowed its ruling as the government wishes it had, the opinion disregarded these proffered facts to achieve a more broadly stated "general rule." It is certainly not counsel's awesome task to augur what might have been based upon a recast record, and we have no doubt that assistant U.S. attorneys throughout the land freely cite the unabridged general rule of *Ocanas* to support superseding indictments and other unilateral judicially unapproved withdrawals from plea agreements.[3] To paraphrase Voltaire: We cannot hear what the government now says, because what the court did in *Ocanas* speaks so loudly. At bottom, the government's attempt to rewrite the *Ocanas* opinion does not obviate the conflict.

Moving on, the government cites *Mabry v. Johnson*, No. 83-328 (June 11, 1983) to support its claim that after entry of a plea, neither of the parties has, as a matter of right, the privilege to withdraw from the plea bargain.

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[3]Indeed, when the United States withdraws, it believes that less restrictive rules apply. In that circumstance, a defendant's "constitutional rights are fully vindicated if his guilty plea is vacated and he is free to replead or stand trial." Amicus Br. 25, *Mabry* v. *Johnson, infra.*

(Opp. 4) This conclusion is tempered by the statement that *Mabry* only "suggests" this result. (Opp. 4) We, however, read *Mabry* as strongly supporting our theory because the Court characterized a plea bargain as "a mere executory agreement which, *until embodied in the judgment of a court,* does not deprive an accused of liberty or any other constitutionally protected interest." (Footnote omitted) The Court added, that it is only when a plea bargain results in a guilty plea and conviction that the Constitution is implicated. Under the federal rules that can only occur if the court accepts the plea bargain and thereby binds the parties – regardless of whether or not it accepts the plea. Since the sentence is the conviction, there can be no sentencing until and unless the plea bargain has been accepted and "[embodied] in the judgment and sentence [of the court]." Rule 11(3). We fail to see, therefore, how a guilty plea standing alone can bind the parties to an executory plea bargain not yet judicially approved. Accord, *Mabry v. Johnson, supra.*

CONCLUSION

At the very least the instant case presents a conflict in the circuits and a serious unresolved issue under the federal rules which should be resolved.

Respectfully submitted,

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